

The respondent requests review of whether claimant sustained an injury arising out of and in the course of employment. Respondent argues claimant did not mention that he stepped into a hole until after his claim was denied and that his initial description of the accident merely described a normal activity of day-to-day living. In the alternative, the respondent further argues the claimant did not meet his burden of proof to establish that he is entitled to temporary total disability compensation.

Claimant notes it is undisputed that he injured his ankle walking into the warehouse. Claimant testified he stepped into a hole while in the warehouse and later showed respondent where the hole was so it could be repaired. Consequently, claimant argues his work exposed him to an increased risk of injury of the type he actually suffered. Claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Eugenio Terrazas worked in the quality control lab for respondent. On November 30, 2006, claimant was walking in the warehouse to retrieve some samples when he stepped in a hole and twisted his right ankle. His ankle began to swell so he asked his supervisor for medical treatment and was told to go to Wesley Hospital. It was determined that claimant had a fractured right ankle.

Claimant testified that he told Cynthia West that he was walking and twisted his ankle. When the accident report was filled out claimant described the incident as "I'm walking and I twist my ankle." At the emergency room claimant again stated that he had twisted his ankle while walking but did not mention stepping in a hole. Later when he saw Dr. Mark S. Dobyys for treatment he provided a history that he slipped and fell but again there is no mention of stepping in a hole in the ground. He later described the accident to an insurance company representative as occurring while he was walking and he twisted his ankle with no mention of stepping into a hole but claimant noted he did not recall the specifics of that conversation because he was taking medication.

Shortly after claimant had the conversation with the insurance representative he was told his workers compensation claim was being denied. Claimant then applied for short-term disability and in the paper work described the accident as occurring when he stepped into a hole. When Ms. West sees this description she has claimant take her to the warehouse to show her where the hole was so it could be repaired. Claimant points out the hole. Ms. West describes the hole as being about 12 inches by 15 inches and a half inch deep.

Claimant then fills out a second application for short-term disability and takes out references to stepping into a hole. Claimant testified:

Q. So after they denied your workers' compensation benefits, that's when you told them about a hole, correct?

A. I don't know if they denied my application at that time. I just filled this paper, because she give it to me.

Q. Sir, I'm going to stop you right now. This is not for work comp. This is for short-term disability. This is Exhibit Number 4, okay? So you submitted Exhibit Number 4 after your workers' compensation benefits are denied, correct?

A. I don't remember what dates they send me the letter from workers' comp.

Q. You submit your short-term disability policy, correct, Exhibit Number 4, and you were denied, correct?

A. (Witness indicates, but no audible response.)

Q. Is that yes?

A. I don't get that.

Q. Okay. Five days later you go back in and you submit a second short-term disability policy marked as Exhibit Number 3; is that correct? And the only change that you make is a description of how the accident occurred, so did you change the description of the accident?

A. Okay. Yes, I do.

Q. Okay. And is that so you could get short-term disability benefits?

A. I changed that, because when they denied my application for workers' compensation, denied my application, Mr. Reynaga asked me, if I fill this way I can get my money, my time out a better way, fast, and I said, "Well, I don't want no problems with nobody. I just want to pay the hospital and my time out, and that's it. I don't want nothing else." But after that, I tell Ramone, "Ramone, there's something wrong. I step in a hole right there," and this is the time he asked me, "Where is the hole?"

Q. It's when you submitted the first short-term disability is when you show him a hole, correct?

A. Yes.¹

The foregoing colloquy illustrates that claimant was not especially sophisticated nor perhaps completely aware of what the applications were for. Nonetheless, when he filled out the first short-term disability form he noted he had stepped in a hole and when requested, took respondent's representatives to the location in the warehouse and showed them the hole.

¹ P.H. Trans. 28-29.

Although the failure to initially mention that he stepped in a hole, appears on its face to be suspicious, nonetheless, when further questioned about his injury the claimant recited that he had stepped in a hole and showed where the hole was in the warehouse. After reviewing the claimant's testimony this Board Member finds claimant did not so much change his testimony as he finally fully explained how he had twisted his ankle. The claimant has met his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

Respondent next argues that it had offered claimant accommodated work and consequently he is not entitled to temporary total disability compensation.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.² This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.³

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

² K.S.A. 44-551.

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 22, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2007.

BOARD MEMBER

c: James A. Cline, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2006 Supp. 44-555c(k).